

**Great Plains Coca-Cola Bottling Company and General Drivers, Chauffeurs and Helpers Local Union No. 886, affiliated with the International Brotherhood of Teamsters, AFL-CIO.** Cases 17-CA-15868, 17-CA-15963, and 17-RC-10740

May 28, 1993

**DECISION, ORDER, AND DIRECTION OF SECOND ELECTION**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On September 4, 1992, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified and to adopt the recommended Order as modified.<sup>2</sup>

The General Counsel has excepted, *inter alia*, to the judge's dismissal of the portion of complaint paragraph

<sup>1</sup> In agreeing with the judge that the election should be set aside and a second election conducted, we do not rely on his finding that the errors on the *Excelsior Underwear*, 156 NLRB 1236 (1966), list affected the results of the election. We find that the Respondent's unlawful conduct during the critical period, including the threats made by Night Production Supervisor Willy Frisby on December 20, 1991, discussed *infra*, was sufficient to affect the election results, warranting a second election.

The Respondent has excepted to the judge's finding that it violated Sec. 8(a)(1) when the Respondent's vice president for sales-western area, William Agnew, coercively offered employee Lisa Weldon a promotion. The Respondent asserts that the judge's finding of a violation for that conduct is inconsistent with the judge's finding that the adverse effects of Agnew's antiunion comments and threats made during the same conversation with Weldon were counteracted by the assurances Weldon received immediately thereafter from the Respondent's director of telemarketing, David Burns. We note that the issue of Agnew's antiunion comments and threats is not before us, but, in any event, Burns' assurances to Weldon did not cure the coerciveness of Agnew's offer of promotion. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

In agreeing that the January 23 photographing of peaceful pickets was illegal as the judge found, Member Oviatt notes that the Respondent earlier had engaged in similar conduct, illegally photographing handbills on September 13, without advancing any justification or even excepting to the judge's finding that its conduct was unlawful in that respect, as well as engaging in other unfair labor practices that color its January 23 activity.

<sup>2</sup> The judge inadvertently failed to include a narrow injunctive provision in his recommended Order and notice to employees. We shall modify the recommended Order and notice to provide such injunctive relief in accordance with the violations found.

5(f) alleging that the Respondent violated Section 8(a)(1) when the Respondent's production manager, Johnny Compton, threatened employee Mark Tate that employees would be discharged if the Union came into the plant. The General Counsel also excepted to the judge's finding at footnote 11 of his decision that the complaint did not contain a paragraph 5(o). We disagree with the judge in these respects for the reasons set forth below.

1. The judge found uncontroverted employee Tate's testimony that on September 27, 1991, Production Manager Compton stated to him that if the Union came in, employees would be required

to take efficiency tests, the production workers would have to take machine tests. . . . and he asked me if I thought that—or he said something to the effect that most of the people in our plant were illiterate and did I think they could pass the test. He said it would probably hurt the people instead of helping people.

The judge, however, concluded that the above-quoted statement did not contain a threat of discharge. We disagree with his conclusion and find that Compton's suggestion that employees' illiteracy may prevent them from passing the efficiency and machine tests which would be imposed as a result of the employees' selection of the Union as their bargaining representative contains an implied threat of discharge if the employees chose representation by the Union. Compton's further statement, that employees would probably be hurt rather than helped, only served to reinforce the threatening tone of the statement. Accordingly, we find that Compton's statement violated Section 8(a)(1) of the Act.<sup>3</sup>

2. Contrary to the judge's finding, the complaint as amended alleges at paragraph 5(o) that the Respondent violated the Act on December 20, 1991, when Night Production Supervisor Willy Frisby informed employees that "it would watch its employees more closely if they selected the Union as their collective-bargaining representative." In this regard, employee Stephen Aiello testified that Frisby told him and about four or five quality control employees in the production office on that date "that management watches you more if there is a union. And they would have to pay more so they watch more, and you would have to work harder." Neither Frisby nor any of the quality control employees present testified. Therefore, Aiello's testimony stands uncontradicted and we find that Frisby threatened employees in violation of Section 8(a)(1).

<sup>3</sup> Chairman Stephens finds it unnecessary to pass on the exception to the dismissal of this allegation since the judge's order contains a cease-and-desist provision concerning threats of discharge.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Great Plains Coca-Cola Bottling Company, Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 1(i) and (j).

“(i) Threatening to watch employees more closely or to require harder work if the employees were to select the Union as their bargaining representative.

“(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

2. Substitute the attached notice for that of the administrative law judge.

## DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by General Drivers, Chauffeurs and Helpers Local Union No. 886, affiliated with the International Brotherhood of Teamsters, AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election.

The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate you concerning your interest in or activity on behalf of General Drivers, Chauffeurs and Helpers Local Union No. 886, affiliated with the International Brotherhood of Teamsters, AFL-CIO.

WE WILL NOT threaten plant closure if you were to select the Union as your bargaining representative.

WE WILL NOT solicit your complaints and grievances with the implied promise to make changes in order to discourage your union activity.

WE WILL NOT threaten you with discharge, layoff, or loss of jobs in order to discourage your union activity.

WE WILL NOT engage in surveillance of your union activity by taking photographs.

WE WILL NOT instruct you not to wear union insignia at the facility.

WE WILL NOT prohibit you from wearing union hats or insignia away from the facility.

WE WILL NOT promise promotion opportunities in order to discourage your union activity.

WE WILL NOT threaten to watch you more closely or to require you to work harder if you were to select the Union as your bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

GREAT PLAINS COCA-COLA BOTTLING  
COMPANY

## DECISION

## STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. These consolidated cases were tried before me at Oklahoma City, Oklahoma, on May 13 and 14, 1992. The complaint, as amended, alleged generally that the Respondent engaged in various violations of Section 8(a)(1) and (3) of the National Labor Relations Act. Some of this activity was also alleged by the Charging Party to have been conduct affecting the results of the election held pursuant to the petition in Case 17-RC-

10740. Thus, the complaint and hearing on objections were consolidated.

The Respondent generally denied that it engaged in any unfair labor practices, or in any conduct affecting the results of the election.

All parties were represented (the General Counsel and Respondent by counsel) and were given an opportunity to call, examine and cross-examine witnesses, and to file posthearing briefs.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Great Plains Coca-Cola Bottling Company (the Respondent or the Company), is a corporation engaged in the manufacture and distribution of soft drinks with its office and principal place of business at Oklahoma City, Oklahoma. In the course and conduct of its business, the Respondent annually purchases and receives directly from points outside the State of Oklahoma, goods, products, and materials valued in excess of \$50,000 and annually sells and ships directly to points outside the State of Oklahoma, goods, products, and materials valued in excess of \$50,000. It is alleged, admitted, and I find that the Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION

The Charging Party and Petitioner, General Drivers, Chauffeurs and Helpers Local Union No. 886, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

### III. FACTUAL OUTLINE

The Respondent is a large soft drink bottling company. Its only facilities involved in this matter are the two located at Oklahoma City. Material to this matter, its employee complement consists of employees engaged in manufacturing, warehousing, and distribution.

With early morning handbilling on September 13, 1991,<sup>1</sup> the Union began an organizational campaign among the Respondent's employees. The Union filed a representation petition on December 5, and an election was held on January 23. Of approximately 453 eligible voters, 168 cast votes for and 254 cast votes against representation.

Beginning September 13, through various supervisors and management personnel, the Respondent is alleged to have engaged in numerous acts violative of Section 8(a)(1), some of which occurred between December 5 and January 23. The latter are alleged by the Union to be grounds for setting aside the election. In addition, there are two allegations of an 8(a)(1) violation occurring after the election. The facts of each allegation will be set forth in the analysis section.

<sup>1</sup> All dates are in late 1991 or early 1992 unless otherwise indicated.

## IV. ANALYSIS AND CONCLUDING FINDINGS

### A. Interrogation

#### 1. Scott Wertzberger

Former employees James Tharp and Arron Childs testified that on September 17, a meeting with six drivers was called by their immediate supervisor, Scott Wertzberger. While other company officials attended, and spoke, Wertzberger led the meeting.

According to Tharp, Wertzberger started the meeting by asking why each had applied for his job. He apologized for any hard feelings the drivers might have and then "he asked us if we had seen the Teamsters handing our (sic) flyers." Childs testified similarly.

Asking employees if they had seen handbilling or handbills I do not believe constitutes coercive interrogation proscribed by Section 8(a)(1). Such a question is rhetorical in nature and does not involve asking employees about their engaging in concerted activity. *Rossmore House*, 269 NLRB 1169 (1984). I therefore conclude that complaint paragraph 5(a) as to Wertzberger should be dismissed.<sup>2</sup>

#### David Burns

Also at this meeting of September 17 was David Burns, the Respondent's director of telemarketing. It is alleged that he interrogated employees, among other things. Though Tharp and Childs testified to certain statements made by Burns, none of the statements attributed to him was in the nature of interrogation. I therefore conclude that the General Counsel failed to prove the allegation in paragraph 5(a) of the complaint as to Burns.

#### Gerald Morris

Randall Hilbers testified that on the first day of handbilling (September 13), Route Supervisor Gerald Morris asked if he was aware of the handbilling and "He asked me if I knew anything directly about it, and I told him, no." Since Morris did not testify, I find that he made the statements attributed to him by Hilbers.

Certainly on the first day of handbilling, that such was going on would be a topic of conversation in the plant. The inquiry by Morris, in such circumstances and isolated from any other unlawful conduct, would be the kind of thing the Board found normal and permissible in *Rossmore House*. I therefore conclude that the General Counsel did not establish Section 5(a) of the complaint as to Morris.

#### Les Talent

Les Talent is another route supervisor. Tharp testified that on September 18 Talent went along on Tharp's route. Tharp testified that Talent "asked me what I thought of the union and I told him that I didn't know, I had heard pros and cons and before I made a decision I was going to find out more about it." Talent went on to "all he had heard about the union was bad things and all they could promise us was monthly dues." Talent did not deny the statements attributed to him, and I find he made them.

<sup>2</sup> The September 3 allegation as to Wertzberger was withdrawn at the hearing.

I conclude that the questioning by Talent went beyond normal inquiry. Talent specifically asked an employee his thoughts about the Union. This, I conclude, was coercive interrogation in violation of Section 8(a)(1).

#### Kent Miller

Kent Miller is also a route supervisor who is alleged to have interrogated employees on September 22 and 27, and October 14. Childs testified concerning two occasions of interrogation by Miller and Tharp one.

Childs testified that during the week after the September 17 meeting, Miller asked "if I had got any literature on the union and I told him that I had. He asked me my opinion on the union and I told him that I did not have an opinion (on) it one way or the other, because I didn't want getting fired." The second time, Miller asked Childs "if I got literature, again. I said that I had and that was the end of the conversation."

Tharp testified that on September 27 Miller and Childs were standing together and Miller "asked us if we had got a literature package from the union and I told him no. He asked us our opinion of the union, how we would vote and I told him that if it was going to benefit me and my family, give me job security, that I was all for it. He told me I had better reconsider what I had heard, what I had found out, because all they could do was promise me monthly dues."

Miller testified but did not deny the testimony of Childs and Tharp.<sup>3</sup> Therefore, I find that he made the statements attributed to him. And I conclude that Miller thereby coercively interrogated employees concerning exercise of their Section 7 rights in violation of Section 8(a)(1).

#### B. Threats of Plant Closure and/or Sale<sup>4</sup>

##### Tom Pierson

Mark Tate testified that on the day of the second handbilling, as he read a handbill supervisor, Tom Pierson, asked what he was reading. Tate told him and Pierson "said, oh, well, if the Teamsters come in you know they will probably shut this plant down" Pierson did not testify, thus I find he made the statement attributed to him.

I conclude that telling an employee that the plant would probably close if employees choose the Union as their bargaining representative was a clear violation of Section 8(a)(1).

##### Johnny Compton

Tate testified that also on September 27, Production Manager Johnny Compton talked to him about what would happen if the Union was successful and "he did say if the company did go union, either they would have to probably shut it down or sell it out to CCE, which is Coca Cola Enterprise."

<sup>3</sup> Miller testified that he did not ride with Tharp on September 27 and then interrogate him. But Tharp did not testify Miller had. Miller's specific denial of an event which is not alleged to have occurred is curious. It does not, however, amount to a denial of the testimony of Tharp.

<sup>4</sup> Several allegations of threats in par. 5(b) of the complaint were withdrawn at the hearing.

Compton denied threatening plant closure or sale to CCE at the meeting of September 13.<sup>5</sup> And he testified generally that he never told employees that the plant would close or be sold in the event the Union was successful. However, he did not testify whether or not he had a conversation with Tate on or about September 27.

I found Tate to be generally credible, and since Compton did not testify at all concerning this conversation, or deny it took place, I conclude that it happened as related by Tate. I conclude that Compton's statement that the plant would probably close or be sold in the event the Union was successful was a threat in violation of Section 8(a)(1).

#### C. Threats of Discharge and Plant Closure

Jack Early is the Company's electronics engineering supervisor. His one bargaining unit employee is Tony Yates. Yates testified that on November 11, Early said "I see you and Andy Gallier have made the union committee list. I said, yes, I did." There followed a 30-minute conversation during which Early said "if the union comes in this plant, he (CEO Browne) will move this company up the road and he said, this is Mr. Browne's plant and he will do what he wants to with it. If the union was to come in today, it would break this plant economically. He would move to Ucon or Mustang."

Early did not testify, and as I found Yates to be a credible witness, I find that Early made the statements attributed to him. I conclude that Early threatened discharge by plant closure should the employees exercise their right to vote for representation by the Union. He thereby violated Section 8(a)(1).

#### D. Threats of Department Closure and Unspecified Reprisals

Yates testified that on January 11 Early came out of his office yelling that he did not need this "headache" and that "I will close this shop down, union or no union. He said people are messing with me. At that time, I said, Jack, if I am giving you any problem, let me know. He said, it's not just you, it is everything." Then he talked about getting out his 105 (which apparently is some kind of a weapon). This is the violation alleged in paragraph 5(d) of the complaint, which is alleged to have occurred on November 11.

While Early was no doubt angry and made threats concerning closing the department and otherwise, from Yates' testimony it does not appear that Early was threatening reprisal because of employees' union activity. Indeed, it appears something else triggered Early's wrath. I therefore conclude that his statements do not make out a violation of Section 8(a)(1) and I will recommend that paragraph 5(d) be dismissed.

#### E. Soliciting Complaints and Grievances

##### Les Talent

It is alleged that in early October and again on October 15, Route Supervisor Talent promised employees improved terms and conditions of employment by soliciting complaints

<sup>5</sup> Counsel for the General Counsel also argued in his brief a threat made by Compton on September 13. However, at the hearing this allegation was withdrawn, thus I will not consider it.

and grievances. This is alleged to have occurred when, according to the undisputed testimony of Philip Graham, Talent told him and another employee that “Mr. Browne wanted a list of things that we would like to see changed at Coke to make it a better place to work.” Graham testified that the other route supervisors—Miller, Morris, and another—verified this.

Talent admitted he asked employees for a list of problems “because I had taken over an area that I was not familiar (sic) with and if there were problems with my drivers as far as their trucks, just in general, what I could do to help things and make it better for them.” And in fact, there were some changes made to the trucks and procedures.

In agreement with the General Counsel, I conclude that by this course of action the Respondent violated Section 8(a)(1). When, during the course of a union organizational drive, an employer asks employees for their complaints concerning working conditions, it thereby impliedly promises to make changes. Such is clear response to, and therefore interference with, the exercise of employees’ Section 7 rights. *Mast Advertising & Publishing*, 286 NLRB 955 (1987).

Robert Browne

Similarly it is alleged that in his letters to employees of December 31 and January 17, Browne solicited grievances.

Counsel for the General Counsel argues that in three paragraphs of Browne’s December 31 letter he used the term communicate (or communications), from which it should be concluded that he solicited grievances. In this letter there is no direct asking employees for their complaints, or any indication that such had been done in the past. “Communication” has a broad meaning and can be on a variety of subjects. It does not appear to be a code word for soliciting grievances. I conclude that Browne’s letter of December 31 does not support the allegation in paragraph 5(e) of the complaint.

However, in the letter of January 17, Browne wrote at length about talking to employees and stated, “The problems and frustrations you have expressed to me in many cases have been addressed or are currently being addressed with your help in the form of cross-functional task forces (pilot projects) to get everyone’s concerns under consideration.”

By this I conclude that Browne promised employees’ that the Company would resolve employees’ grievances and he did so in the context of an ongoing campaign for representation. His direct message to employees was to eschew the Union and the employees’ problems would be addressed and solved. Such violates Section 8(a)(1).

#### *F. Threats of Discharge, Layoff, or Loss of Jobs<sup>6</sup>*

David Burns

At a meeting of route drivers on September 17, referred to above, Burns is alleged to have threatened employees with discharge, layoff, or loss of jobs. Lisa Weldon testified to this event, stating that Burns did most of the talking and after noting that the Union was trying to come into the Company, he invited employees to go to the union hall and get literature and said, “Don’t feel like your job is going to be

threatened because we won’t do that to you.” She testified that Burns went on to say “that more than likely there would be a lot of people laid off.”

Tharp testified that Burns “spoke up and he said, it is a touchy situation and he did not want to tell us what to do because if the Teamsters were voted in there would be layoffs, cutbacks, and the company would go into financial trouble.” Childs concurred, testifying that Burns “said he didn’t want to say much about it, but if the union come in there would be layoff, cutback and financial trouble (sic).”

While Burns did not specifically deny telling employees there would be layoffs, he did state that he told them they were free to explore the truth and “there will be no reprisal.”

Burns testimony that he specifically told employees there would be no reprisals was confirmed by Weldon. However, his statement that there would probably be a lot of layoffs gives the clear message that by selecting the Union, the employees would put their jobs in jeopardy. Such is not protected by Section 8(c). On balance, therefore, I conclude that the General Counsel did establish the violation alleged in paragraph 5(f) as to Burns.

Johnny Compton

Counsel for the General Counsel argues that in the conversation Compton had with Tate on September 27, set forth above in section B, Compton threatened employees with discharge by stating that with the union people would be required to “to take efficiency tests, the production workers would have to take machine tests. . . . and he asked me if I thought that—or he said something to the effect that most of the people in our plant were illiterate and did I think they could pass the test. He said it would probably hurt the people instead of helping the people.”

Although Tate’s testimony concerning this conversation stands undenied, I find nothing in the quoted statement which threatened employees with discharge, layoff, or loss of jobs should the Union be selected. Thus, I conclude that the General Counsel did not establish the violation alleged in paragraph 5(f) as to Compton.

Spencer Nero

Warehouse department employees Larnell Dennis, Roy Webb, and Michael Holman all testified that at a department meeting on or about October 23 warehouse supervisor, Spencer Nero, told them they did not want the Union. He told them if the Union came in, the Company would layoff half the employees in order to pay the other half.

Nero denied making such a statement to employees, but did say that he often is asked about the downsizing of the warehouse department, which, in the last 2 years, has gone from 26 to 19 employees.

The testimony of Dennis, Webb, and Holman is mutually corroborated and was generally credible. I credit their testimony and discredit Nero’s denial and find that he made the statement attributed to him. I conclude that Nero threatened loss of jobs should the employees select the Union as their bargaining representative and thus violated Section 8(a)(1).

<sup>6</sup>Alleged violations by Scott Wertzberger on September 3 and Doug Chance on September 13 were withdrawn at the hearing.

William Agnew

Lisa Weldon testified that a couple weeks before the election William Agnew (the Company's vice president for sales, western area) told her to come into his office. Among other things, he told her that having seen her name on the union committee list "just disgusts me." Finally, "He tossed a 'No Vote' pin at me and said I suggest you wear this or you can find you another job."

However, she further testified that thereafter Burns told her not "to worry about it. I told him (Burns), right now I am so confused I don't know whether or not I want to go union or not. Right now I just fear for my job. He said, don't worry about your job because Will Agnew is on his way out, anyway. As far as Will Agnew, don't let it be a concern to you because he is going to be gone after this, anyway."

Weldon was credible, and as Agnew did not testify,<sup>7</sup> I conclude he made the statements attributed to him, which certainly contained a veiled threat of discharge. *Heritage Nursing Homes*, 269 NLRB 230 (1984). However, under the circumstance of Burns' immediate assurance to Weldon that whatever Agnew said was no threat to her, I conclude that a remedial order as to this event would not be appropriate. Accordingly, I will recommend that paragraph 5(f) as to Agnew be dismissed.

*G. Telling Employees Selecting the Union Would Be Futile<sup>8</sup>*

David Burns

Graham testified that in late October he had a conversation with Burns about job related matters, "me and David have been friends for quite awhile and he had made the statement that we are not going to be able to sit down and have these little chit-chats like we used to." And, "he said that Mr. Bob Browne, himself, told the managers that they would not negotiate with the Teamsters in this matter."

Burns testified that "What I said, Bob Browne won't tolerate this and so he (Graham) picks up on that and says, are you telling me Bob Browne won't negotiate with the union? I said, absolutely not, that is not what I am saying. I am saying Bob Browne won't tolerate me if I don't—if I allow working conditions to get to the point where you think that's your best alternative. If I don't handle your problems in a way that you find the relief you need, he is going to have a problem with me."

I found Burns to be a generally credible witness, and conclude that his version of the conversation with Graham is more likely than Graham's. I conclude that Burns did not tell an employee that it would be futile to select the Union or that the Company would not negotiate with the Union.

John Ustes

Similarly, in late December or early January, maintenance supervisor, John Ustes, is alleged to have told the members of the Eagle Team "that there was no way that he was going to let the union come in, he would not agree to any contract that was made." This is from the testimony of Linda

Mahurin. Tate testified that at one of the company sponsored weekly antiunion meetings, Ustes said "if you think I am going to negotiate with the Teamsters, you've got to be crazy." Ustes denied making the statements attributed to him by Tate and Mahurin.

Ustes testified that he told employees that he would not personally negotiate with the Union, that he would participate, but that negotiations would be done by a "third-party representation." This is not inconsistent with Tate's testimony and I believe more accurately represents the statements made by Ustes.

Mahurin's specific testimony that Ustes said he would not agree to a contract was not included in the affidavit given by Mahurin during the Board's investigation. This, and the fact that Mahurin's statement is not corroborated by Tate, lead me to conclude that Ustes denial is more credible. I therefore conclude that the General Counsel did not establish the allegation in paragraph 5(h) as to Ustes.

David Burns

Yates testified that at a meeting of employees on January 14, "David Burns, he said, Mr. Browne would never negotiate contract. I said, that's against the law, you are—the employer is supposed to negotiate fairly." None of the other employees present at the meeting testified. Burns denied making this statement, a denial which counsel for the Respondent contends was corroborated by Ustes. I find in the record no specific corroboration by Ustes, thought such might be a reasonable interpretation of his testimony.

Yates generally gave credible and detailed testimony, however on this allegation his testimony is sketchy, open to interpretation and not corroborated, though there were other employee witnesses available. Burns was also a generally credible witness. On balance, I credit Burns' denial and conclude his statement to employees was not precisely as recalled by Yates. If he used other words than those specifically testified to by Yates there would not necessarily be the violation alleged. Therefore, I conclude that the General Counsel did not establish paragraph 5(h) as to Burns.

*H. Engaging in Surveillance by Taking Photographs*

The Respondent admits that Manager Raymond Lawton took photographs of the Union's handbilling (and of employees accepting the handbills) on September 13 and of employees picketing on January 23.

Counsel for the Respondent made no argument concerning the September 13 matter, but contends that photographing the picketers on January 23 was necessary to preserve evidence perceived unfair labor practice on the part of picketers.

Counsel argues that the picketers challenged "the sterility the voting environment by shouting, carrying signs and handbilling within view and hearing of the polling place."

The Respondent's evidence does not support this argument. Ustes testified that the polling place was about 40 yards from the entrance of the building and "there was a lot of truck activity in the area, a lot of trucks pass through there and especially at that time, probably as many as 80 trucks pass by in certain periods. All I heard was some shouting, periodically." Burns testified that it was about 30 paces from the site of the picketing to the building and another 40 paces from there thereto the polling place. When

<sup>7</sup> Agnew apparently is no longer employed by the Company.

<sup>8</sup> Par. 5(g) was withdrawn at the hearing. The section designations in this part of the decision are meant to track the complaint, therefore, G. is omitted.

asked if one could see from “one point to the other,” he said, “No.”

Taking photographs of employees who are engaged in protected activity is inherently intimidating and in the absence of proper justification, violates the Act. *Waco, Inc.*, 273 NLRB 746 (1984), and cases cited therein.

Here there was no attempt to justify photographing the September 13 handbilling. Although the handbilling was by union agents, rather than picketing by employees, employees were present when the pictures were taken, and as testified to by Mark Harvey, some who were in line to take a handbill turned and left. For purposes of the intimidating effect on employees, I conclude there is no distinction between picketing and handbilling.

The offered justification for photographing the January 23 picketing is not supported by the Respondent’s evidence. Employees were peacefully picketing with signs encouraging fellow employees to vote “yes,” but they were some distance from the polling place and could not be seen from it. Other employees could see the pickets on their way to work, but this is not improper interference with the election.

I therefore conclude that the Respondent violated Section 8(a)(1) of the Act when Lawton took pictures of the handbilling on September 13 and of the picketing on January 23.

#### *I. Informing Employees It Would Cease Communicating with Them*

In the conversation Graham had with Burns in late October referred to above, Graham testified that Burns said, “we are not going to be able to sit down and have these little chit-chats like we used to. I asked him why not, and he said, you would have to have your union steward present whenever you wanted to talk to me.”

This statement is alleged to have been violative of Section 8(a)(1). The Board has held that an employer does not violate the Act by telling employees that with the Union will be “a change in the manner in which employer and employee deal with each other,” *Tri-Cast, Inc.*, 274 NLRB 377 (1985), or a “loss of access to management,” *Koons Ford of Annapolis*, 282 NLRB 506 (1986), or that the Company’s “open-door policy” would no longer exist. *SMI Steel*, 286 NLRB 274 (1987).

Considering the statement by Burns in light of these cases, I conclude he did not violate the Act.

#### *J. Instructing Employees Not to Wear Union Insignia at the Facility*

It is undisputed that on January 9, Supervisor Bill McClure told employee Roy Webb that the “union” jacket he was wearing was unacceptable. McClure told Webb that only Coca Cola jackets were allowed. Webb said that next time he would leave the jacket in his car, though he continued to wear it that day. Though unclear from the record, it appears that Webb did not wear the jacket subsequently.

It is unlawful, absent special circumstances, for an employer to prohibit employees from wearing union buttons. *Burger King Corp.*, 265 NLRB 1507 (1982). The Board treats article of clothing the same as a button. *Mack’s Supermarkets*, 288 NLRB 1082 (1988).

Since the Respondent offered no special circumstance for prohibiting the wearing of union jackets, I conclude

McClure’s announcement to Webb violated Section 8(a)(1) of the Act, notwithstanding that he did not immediately take off the jacket.

#### *K. Prohibiting Employees from Wearing Hats with Union Insignia Away from the Facility*

Tony Yates testified that on January 10, Early told him he was “not supposed to wear anything but Coke uniform, so you need to get that (union) hat off and put a Coke hat on, Tony.” There followed some conversation about this and about 3 hours later, Yates was told by production manager, Bill McClure, “its okay for you to wear the union hat, since everyone else is going to wear their sweatshirts, nonunion sweatshirts, you can wear your hat, but don’t take it out into the public. I said, okay.”

Not only did the Respondent not offer evidence of special circumstances for prohibiting the wearing of union insignia away from the plant, there is evidence that supervisors wore “vote no” buttons.

The Respondent’s argument on this allegation is that the prohibition of Yates wearing his union hat at the plant lasted only 3 hours. The Respondent did not address the further off-site prohibition. Though the original instruction to Yates was rescinded, the Respondent never rescinded the general prohibition against wearing union insignia off the premises. Since there was no showing of special circumstances, I conclude that McClure’s instruction to Yates was violative of Section 8(a)(1).<sup>9</sup>

#### *L. Promised Unspecified Promotion Opportunities*

In the conversation set forth in section K, between Webb and McClure, McClure is said to have “said that he feels there are ways to get better position and pay throughout the company.”

I reject the General Counsel’s contention that implicit in this statement is a promise of benefit in violation of Section 8(a)(1).

It is also alleged that Agnew made a promise of benefit to Weldon in conversation about 2 weeks before the election in which he made the threat found in section F above. Weldon testified that Agnew “even offered me a promotion in the same breath that day, he said, I can promote you if you like, an I said, no, I am fine right where I am at.”

Although Weldon declined, in the context of Agnew’s antiunion comments and threats, the offer of a promotion was coercive and violative of Section 8(a)(1). E.g., *Gencorp General Tire Division*, 294 NLRB 717 (1989).<sup>10</sup>

#### *M. Informed an Employee that his Union Support Caused him to Receive a Smaller Wage Increase*

Yates testified that on January 3, Early told him it was time for a regular performance review and said “we are going to give you four percent this year, I would like to get you more money, but your name showed up on the union committee list and Bill (presumably McClure) and Don

<sup>9</sup> Though Early is named in the complaint, the evidence was that McClure gave the unlawful instruction alleged, and as this was fully litigated, the violation may be found.

<sup>10</sup> The violation found was not alleged, as to Agnew, but it was fully litigated, thus may be the basis of a remedial order and objections to the election.

Buckmeir had seen your name on the list and I don't think it would be very easy to pass any more money through them. I said, wait a minute, you just tell me that the reason I wasn't getting any more money was because they seen my name on the union committee list. He said, what I really mean is, the company cannot afford more than a 4 percent raise this year. I said, okay. He said, I would like to get you more money next year."

Yates' testimony is undeniable; however, what Early is reported to have said is ambiguous. He first said that Yates was denied more than a 4-percent raise because of his union activity, but when questioned, said the Company could not afford more. In view of this, I conclude that Early's statement was not violative of Section 8(a)(1).

*N. Interrogated an Employee About Charges Filed with the NLRB<sup>11</sup>*

Yates testified that on March 10, Early "said, you know, I know you filed federal charges on me, Tony. I said, I don't know what you are talking about. He said, you know exactly what I am talking about, you are the only one under me. That was about it." Later that day, Yates initiated further conversation about this.

Again, Yates' testimony was undeniable; however, nothing in his testimony amounts to interrogation. At best, Early made a declarative statement that Yates had filed charges. I do not believe such to be violative of the Act.

*O. Impliedly Threatened Employees*

The next day, Yates requested a meeting with Early and McClure because he felt that Early's attitude toward him had been "very negative" recently. During this, that Yates had filed "federal charges" was discussed.

Yates testified that Early said, "you know, you filed federal charges on me. It is hard to be nice, I can't pretend to be nice. He then said, I could have put you out there in that pit, which is a wash rack. He said, if you want to change positions, Tony, we can put you back over there building pallets, west side shipping. I said, no, Jack, I like my job just fine. He said, well, you tried to push that union down my throat and it put pressure on me."

The General Counsel argue that by saying he could have put Yates in the pit, which Yates referred to as a "dirty, nasty filthy job," Early made an implied threat. I reject this argument. I find no threat in Early's statement, implied or direct. Further, whatever was said was in the course of a conversation initiated by Yates. The general tenor of the discussion as related by Yates does not appear coercive. Therefore I will recommend this allegation be dismissed.

*P. The 8(a)(3) Allegations*

*1. Denying Mark Tate overtime*

It is alleged and denied that on November 8, Tate was instructed to clock out and go home early, thus denying him overtime because of his activity on behalf of the Union.

Records of the Company show that of the five team leaders, two received no overtime during the week ending November 8, one received .30 hours, one .64 hours, and Tate

received .90 hours. That Tate was denied overtime generally available to other team leaders is not supported by the documentary evidence. On November 8 he received more overtime than any other team leader. There is no support for his testimony that he had not worked 40 hours when told to clock out. Indeed, the evidence suggests the contrary—that he had worked 40 hours plus .9 hours overtime.

Further, a review of the summary of overtime for team leaders from weekending November 1 through weekending January 31 shows that Tate generally received as much or more overtime than any other team leader.

It may well be, as Tate testified, that his supervisor told him to clock out on November 8 and that there was still work to be done. However, this does not mean that but for his union activity, Tate would have received more overtime that day. I do not believe it is reasonable to assume he would have. Therefore, I conclude that the General Counsel failed to establish the violation alleged in paragraph 6(a) of the complaint.

*2. Issuing a warning to Mark Tate*

It is alleged and admitted that on December 21, Tate was given a warning for having been absent for scheduled overtime on December 21. The Respondent denies this was for reasons proscribed by the Act.

Tate admitted that he was absent on December 21, but contends that he was given permission. Tate testified that at the time James Hyrick was the team coordinator and he was a line employee. Early in the week Hyrick asked Tate if he could work Saturday and Tate said he could not, he had planned to take a trip. Hyrick told him this would be no problem, and he would get someone else to work in Tate's place.

Tate admitted that a schedule of who was to work on December 21 was posted the preceding Wednesday and he was on the schedule. He contends, however, that he saw no supervisor Friday or Saturday whom he could ask for permission to be absent on Saturday.

Team coordinators are not supervisors. Notwithstanding Tate's suggestion to the contrary, they do not have the authority to give time off (authority which is associated with supervisory status) according to the credible testimony of Compton. Compton further testified that there are four supervisors in the area where Tate worked who would have been available to give permission for him not to work.

I conclude that Tate was scheduled to work on December 21, did not do so and had not asked to be excused from one who had the authority to give such permission.

The warning Tate was given the following Monday is certainly not out of line with his offense, and I conclude that absent his union activity, under these facts Tate would have been similarly disciplined. Accordingly, I conclude that the General Counsel failed to establish the violation alleged in paragraph 6(b).

*3. Limiting the annual pay raise to Tony Yates*

As noted above, in early January Early gave Yates his annual performance evaluation which recommended a 25-cents per hour wage increase. Yates testified that first Early said he could not get more of an increase because Yates was named on the union organizing committee. When questioned, Early said that 4 percent was all the Company could afford.

<sup>11</sup> This paragraph was added at the hearing. There is no paragraph O.

He added his hope that Yates would be given a larger increase next year.

The raise Yates received is not necessarily inconsistent with his performance review. Nor is there any evidence that he was treated disparately. The only evidence tending to prove this allegation is Yates' testimony, which I find was minimal and not particularly persuasive. Given the dearth of evidence on this issue, I conclude that paragraph 6(c) was not established.

#### V. REMEDY

Having concluded that the Respondent engaged in certain unfair labor practices affecting interstate commerce and the free flow thereof, I shall recommend that it cease and desist therefrom and take certain affirmative action and that the Board issue the Order set forth below.

#### VI. REPORT ON OBJECTIONS

Following election, the Union filed timely objections, which included some of the allegations set forth in the complaint as well as an allegation that the list of employees furnished the Company "contained in excess of 25% incorrect employee addresses."

The petition was filed on December 5 and the election was held on January 23. The tally of ballots shows that of approximately 453 eligible voters, 168 cast ballots in favor of representation by the Union and 254 were opposed. Thus, the issue raised by the Union's objections is whether the Company's conduct between December 5 and January 23 was sufficient to conclude that it affected the results of the election, considering the size of the unit, the severity and extent of the conduct and other relevant factors. E.g., *Metz Metallurgical Corp.*, 270 NLRB 89 (1984).

The Respondent contends that none of the activity alleged, even if true, was more than de minimis, and therefore the election should not be set aside. The General Counsel took position on the objections. The Union did not file a brief.

##### a. The *Excelsior* list

Mike Harvey, the Union's agent in charge of this organizational campaign, testified that the list he received from the Company pursuant to *Excelsior Underwear*, 156 NLRB 1236 (1966), had 86 to 90 incorrect addresses, based on returns of mail the Union sent to employees. On the Union's copy of the list offered into evidence, there are 94 highlighted names, 79 of which show some handwritten correction to the address.

Counsel for the Company stated that based on the Company's returned mailings, he would guess that the number of incorrect addresses was more like 40 or 50. He stipulated the incorrect number was in the neighborhood of 10 percent. A subsequent witness for the Company had 38 returned mailers.

It should first be noted that there were simply errors on the list, not omissions from the list. Further, there is no evidence that errors were part of a plan by the Company or were even due to the Company's negligence. While the Board considers errors less serious than omissions, *EDM of Texas*, 245 NLRB 934 (1979), substantial compliance with the *Excelsior* rule is required, lest the employer defeat its purpose: "to further 'the fair and free choice of bargaining representatives . . . by encouraging an informed employee

electorate and by allowing unions the right to access to employees that management already possesses.'" *Thrifty Auto Parts*, 295 NLRB 1118 (1989) (citations omitted).

The policy of requiring a company to furnish a list of employees' names and addresses is to give the petitioning union a fair opportunity to communicate with employees. Whether the policy has been met in a particular case depends on the number of errors on the list, and whether, even with the errors, the Union has had a fair chance to present its case to the employees. The fact that the Company may have used the same list for its mailers is beside the point, since the Company can, and did, communicate its position to employees at the plant. Company witnesses testified that they had at least four meetings with each employee.

The list submitted as a union exhibit has 94 highlighted names, which are those whose addresses were in error according to the Union. Of this, 79 were apparently corrected; however, it is unknown when the Union received the correct addresses and whether such was in time to communicate effectively with the employee. Any question in this regard must be borne by the Company, since it was the Company which furnished the list.

From the Company's witnesses and the stipulation of its counsel, there is little doubt that at least 10 percent of employee addresses were wrong. From this I conclude that the Company did not comply with the *Excelsior* rule. In a bargaining unit of this size, where employees live in various towns (but mostly Oklahoma City) errors in addresses which render a mailer undeliverable seems as serious as the omission of names. In either case, the Union was not given a fair opportunity to communicate with these employees. Further, that the Union may have in fact communicated with most of the employees whose addresses were in error does not cure the Company's breach of the *Excelsior* rule. *Thrifty Auto Parts*, supra.

It is of course unknowable whether this affected the outcome of the election. But it could reasonably have had a substantial impact on how a significant number of employees voted. Therefore, I conclude that the errors on the *Excelsior* list were sufficient to affect the results of the election and on this basis, the election should be set aside.

##### b. Other objectionable conduct

To summarize, above I concluded that the Company violated Section 8(a)(1) when it: promised employees that it would resolve employee grievances in Browne's January 17 letter; took photographs of picketing on January 23; instructed an employee not to wear his union jacket on January 9; instructed an employee not to wear union insignia off the premises on January 10; and, coercively offered an employee a promotion 2 weeks before the election.

The last three acts were directed only to one employee of a unit in excess of 450 and might be considered minimal. However, Browne's letter went to all employees and it is reasonable to conclude that the photographing was seen by a substantial number of employees.

On balance, therefore, I conclude that the Company's conduct during the critical period was sufficient to affect the results of the election and that even without the *Excelsior* violation, the election should be set aside and a second election directed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

#### ORDER

The Respondent, Great Plains Coca-Cola Bottling Company, Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their interest in, or activity on behalf of, the Union.

(b) Threatening plant closure if employees were to select the Union as their bargaining representative.

(c) Soliciting complaints and grievances with the implied promise to make changes in order to discourage union activity.

(d) Threatening discharge, layoff, or loss of jobs in order to discourage union activity.

(e) Engaging in surveillance of employees' union activity by taking photographs.

(f) Instructing employees not to wear union insignia at the facility.

(g) Prohibiting employees from wearing union hats or insignia away from the facility.

<sup>12</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(h) Promising promotion opportunities in order to discourage employees' union activity.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility copies of the attached notice, which is marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 17-RC-10740 is severed and that the election conducted on January 23, 1992, in Case 17-RC-10740 is set aside and a new election be held as directed below.

[Direction of Second Election omitted from publication.]

<sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."